IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

R.S.A. No. 3940 of 2002 (O&M)
Date of Decision : 21.11.2007

Darshan Singh & Anr.

.....Appellants

Versus

Gurdev Kaur & Ors.

.....Respondents

CORAM : HON'BLE MR. JUSTICE VINOD K. SHARMA

Present : Mr.Amit Rawal, Advocate
for the appellants.

Mr.G.S. Punia, Advocate
for the respondents.

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VINOD K. SHARMA, J.

This regular second appeal has been filed against the judgment and decree passed by the learned Additional District Judge, Ludhiana decreeing the suit filed by the plaintiff respondents for possession of land measuring 26K-4Ms situated at village Burmi, Tehsil Raikot.

The respondent plaintiffs filed a suit on the plea that Kartar Singh and Ralla Singh were brothers. Ralla Singh had no issue whereas Kartar Singh had three sons namely Darshan Singh, Gulzar Singh and Dalbara Singh. Dalbara Singh was adopted by Ralla Singh vide adoption deed dated 21.11.1945. Dalbara Singh died in the year 1970. A suit was filed by Ralla Singh which was dismissed by the learned Court of Sub Judge Ist Class, Jagraon on 3.2.1976 in which Ralla Singh had claimed a

declaration to the effect that he was owner in possession of land measuring 36K-4M i.e. the disputed land. It was claimed that the defendants had no concern or connection with or in the said suit land. Thereafter, Ralla Singh filed an appeal before the District Court against the judgment and decree dated 3.2.1976 passed by the learned Court of Sub Judge Ist Class, Jagraon. The said appeal was accepted by the learned District Judge, Ludhiana vide its judgment and decree dated 3.11.1977. Thereafter, the plaintiffs filed regular second appeal No. 80 of 1978 in this Court, which was accepted on 27.2.1987 by the Hon'ble Single Judge of this Court by setting aside the judgment and decree passed by the learned Addl. District Judge, Ludhiana and restoring that of the Sub Judge Ist Class, Jagraon. Ralla Singh by taking undue advantage of the judgment and decree passed by the learned Addl. District Judge, Ludhiana, by ignoring that of Sub Judge Ist Class, Jagraon, which was decided in favour of plaintiff Nos. 2 & 3, who were minors, took possession of the suit land during the pendency of the appeal before the Hon'ble High Court.

Darshan Singh and Gulzara Singh executed a paper transaction of sale and Will in their favour in respect of the suit land during the pendency of the said appeal before the High Court. It was claimed that both the sale deeds and alleged Will, being against the rights of the plaintiffs, was void and illegal as the parties were bound by the order passed by the High Court because S.L.P. against the judgment and decree of the High Court was also dismissed by the Hon'ble Supreme Court on 27.11.1991.

It was claimed that the mutation of the suit land during the pendency of the appeal sanctioned in favour of the defendants was illegal

and liable to be ignored as per the orders of the Hon'ble High Court dated 27.2.1987 because the intention of Darshan Singh and Gulzara Singh was to deprive the plaintiffs of the property by influencing overwhelming or having any other exercise over the mind of Ralla Singh to deprive Darshan Singh and his sons and his representatives even of property which he would have got in the natural succession. Darbara Singh was the son of Kartar Singh out of whose property he would have got 1/3rd share by natural succession but because of his adoption by Ralla Singh he has been deprived of natural succession as well as succession to his adopted father.

It was also the case of the plaintiffs that after the death of Darbara Singh, Kartar Singh and Ralla Singh made an attempt to become guardian of plaintiffs No. 2 & 3 as they were minors at that time against plaintiff No.1, who was their natural guardian. An appeal was also filed to show that Kartar Singh and Ralla Singh were in possession of land left behind by Dalbara Singh but a receiver was appointed to auction the land during the year 1976-77 by virtue of which plaintiffs were entitled to get the possession of the suit land in view of the judgment and decree passed by this Court on 27.2.1987.

An application under Section 144 C.P.C. for restoration of possession was filed by the plaintiffs which was ultimately found not to be maintainable and, therefore, the present suit for possession was filed. The claim was also made for correction of revenue record as per the findings of this Court.

The notice of the suit was given to the defendants, who contested the case by raising preliminary objection that the plaintiffs have

no right,title or interest in the property in dispute and that they cannot claim possession of the suit property. It was claimed that Ralla Singh deceased was owner in possession of the property in dispute, who had become owner of the property by way of adverse possession by virtue of which, plaintiffs have lost their rights and remedies if any in respect of the property in dispute. It was claimed that defendants being purchasers from Ralla Singh, since deceased, have continued in possession of the property in dispute as owner in pursuance to the purchase vide two sale deeds dated 24.6.1981 in pursuance of which possession of the suit property was delivered to the purchasers at the spot and since then they are in possession of the property in dispute as owners openly, adversely and hostile to the knowledge of the whole world. The plaintiffs are estopped by their act and conduct to file the present suit which was not properly valued for the purposes of Court fee and jurisdiction.

On merits, it was claimed that Dalbara Singh, who died in the year 1970 was adopted by Ralla Singh. The suit filed by Ralla Singh was dismissed by the learned Sub Judge Ist Class, Jagraon whereas the appeal filed by him was accepted by the learned Addl. District Judge, Ludhiana. Gurmukh Singh and Lakhbir Singh said to have filed a civil Suit No. 229/252 which was dismissed on 17.12.1979. In the said suit for injunction it was held that the plaintiffs were not in possession of the land when they filed said suit and they did not enter into possession of the land even thereafter whereas defendant Ralla Singh was found to be in possession of the land in dispute. Similarly, Ralla Singh also filed a civil suit No. 63 of 1979 against Gurdev Kaur and others which was decreed in respect of the

property in dispute in which it was held that Ralla Singh was proved to be in possession of the property as owner by virtue of which the suit of the plaintiffs was held to be barred.

Mutation was entered in favour of Ralla Singh after the decision by the learned Addl. District Judge, Ludhiana and Khasra Girdawari and Jamabandi also indicate the said fact and thereafter, the defendants on the basis of registered sale deeds dated 24.6.1981 were in possession as owners of the property in dispute. The sale deeds were executed by Ralla Singh bona fide for consideration.

The defendants have become the owners by adverse possession as they have been actually, physically, openly and hostile to the whole world including the plaintiffs and adversely in possession as owner and their possession can be easily tacked with possession of Ralla Singh, the predecessor in interest of the defendants because the possession was never surrendered to Dalbara Singh by Ralla Singh, who executed registered sale deeds for consideration in favour of the defendants. High Court did not decide the adverse possession of Ralla Singh viz-a-viz adverse possession of the defendants.

There was no question of depriving the plaintiffs of any property as the plaintiffs had no right, title or interest in the property in dispute as Dalbara Singh was not natural son of Kartar Singh, who was never deprived of any share by Ralla Singh. Guardian Court has to appoint a receiver but the possession of the property was taken from Ralla Singh by receiver and not by Dalbara Singh or any of his legal heir and the possession from receiver was taken by Ralla Singh.

From the pleadings of the parties, following issues were framed by the learned trial Court :-

1. Whether the sale deeds No. 6156 and 6157 are liable to be set aside as alleged ? OPP
2. Whether mutation No. 4958 dated 19.12.1977 is liable to be set aside as alleged ? OPP
3. Whether the plaintiff is entitled to possession of the suit land ? OPP
4. Whether the suit is not maintainable in the present form ? OPD
5. Whether the possession of the defendant over the suit land is adverse possession to the plaintiff ? OPD
6. Whether the suit is barred by time ? OPD
7. Whether the plaintiffs are estopped by their acts and conduct from filing the suit ? OPD
8. Whether the suit is not properly valued for the purposes of court fee and jurisdiction ? OPD

8(a) Whether the suit is barred by Order 2 Rule 2 C.P.C. ?OPD

9. Relief.

Issue No.6 framed to the effect “whether the suit is barred by time ? was amended by the learned Addl. Civil Judge (Sr.Divn.), Jagraon vide order dated 12.3.1997 in the following manner on an application moved by the defendants.

“6. Whether the suit is within limitation ? OPP

Issues No.1 to 6 were taken together by the learned trial Court and were decided against the plaintiffs.

On issue No. 7, it was held that the plaintiffs are estopped by their acts and conduct from filing the suit. Issue No.8 was decided in favour of the plaintiffs and consequently the suit filed by the plaintiffs was ordered to be dismissed.

The plaintiff respondents filed an appeal against the judgment and decree passed by the learned trial Court. The learned Addl. District Judge, Ludhiana was pleased to allow the appeal and consequently the suit filed by the plaintiff respondents for possession was ordered to be decreed.

The learned lower appellate Court was pleased to observe as under :-

> "That suit had been dismissed by Sh. S.K. Garg. But a perusal of his judgment goes to show that he had heavily relied upon judgment of Sh. Amarbir Singh, the then Additional District Judge, Ludhiana holding Ralla Singh to be owner in possession of land while dismissing the suit filed by Gurmukh Singh, Lakhbir Singh etc. Since judgment and decree of Sh. Amarbir Singh Gill, have been set aside in regular second appeal, the very basis of this judgment goes and this does not help the defendants in any way. X.D.4 is decree sheet in that suit. Defendants are further placing reliance upon judgment Ex.D5 delivered in civil suit No. 63 of 1979 filed on 17.4.1979 decided on 8.11.1979 by Sh.M.S. Walia, the then Subordinate Judge Second Class, Jagraon, a suit for grant of permanent

injunction filed by Ralla Singh against Gurdev Kaur, Ajaib Singh etc. in that suit Sh. Walia held that Ralla Singh was owner in possession of suit land. He gave a very strange finding rather he indulged in over doing. In a suit for injunction, question of title is not to be decided. It is difficult to understand as to how Sh. Walia embarked upon path of declaring Ralla Singh to be owner of land when he had not sought such a declaration. Further more this judgment cannot over ride judgment of Hon'ble High Court in Regular Second appeal vide which Ralla Singh was not held to be owner in possession of suit land and his suit was dismissed. Judgment of Sh. Walia is least convincing and does not show proper application of mind. Ex.D6 is decree sheet in that suit. After winning the battle upto Hon'ble Supreme Court, the present plaintiffs have filed an application u/s 144 Cr.P.C. for restitution of possession contending that since decree of Additional District Judge, Ludhiana dated 3.11.1977 had been set aside in regular second appeal and Ralla Singh had come into forcible possession of suit land on strength of that decree, therefore, possession be got restored to them. Sh. K.S. Bhullar, then Sub Judge Ist Class, Jagraon vide his order dated 2.6.1992 had directed issuance of warrant of possession but on an appeal having been preferred, Sh. A.S. Sodhi, the then Additional District Judge, Ludhiana, vide his judgment dated 11.9.93 copy Ex.D7 accepted the appeal and set aside order of Sh. K.S. Bhullar observing that

since Ralla Singh had not obtained possession under order of the court and had got into possession unlawfully application for restitution was not maintainable and remedy of applicants was only by way of independent suit. This judgment was challenged by present appellants by way of filing appeal in Hon'ble High Court. Mr. Justice N.K. Kapoor, Hon'ble High Court of Punjab & Haryana while dismissing their appeal on 7.10.1994 observed that application u/s 144 C.P.C. filed by plaintiffs was misconceived. Then they filed suit for possession which was registered as civil suit No. 59 of 13.2.95, which suit was vehemently resisted by defendants, contending that suit was time barred. A very interesting situation has arisen. After getting a verdict in their favour by present plaintiffs from Hon'ble High Court which has been affirmed by Apex Court, the plaintiffs, who had been dispossessed by defendants having no right or concern with the suit land sought possession of that land filing application u/s 144 CPC which although was allowed by trial Court but declined by first appellate Court and second appellate Court. There the plea of present defendants, to which the appellate Court agreed was that the proper remedy for plaintiffs was to file suit for possession and when the plaintiffs filed suit for possession, then defendants came up with objections that suit was time barred. It is a classic case of “Heads I win, tail you lose”. The defendants are trying to create 'no win' situation for the plaintiffs. Plaintiffs being legal

representatives of Dalbara Singh, owner of suit land, are being denied possession of that land on one ground or the other. And unfortunately, the trial Court was swayed away by the arguments put forward on behalf of defendants and trial Court did not go deep into the matter and applied its mind properly to the facts and circumstances of the case, completely mis-appraising the evidence and rather mis-interpreted the law. In para No.8 of the judgment, a reference has been made to some admission on part of attorney of plaintiff while facing cross examination that Ralla Singh, deceased had come into possession of suit land in the year 1970. The statement of witness is to be seen in whole, one or two lines cannot be picked up and interpreted in isolation so as to give meaning favourable to particular party. Gurdev Singh in his examination-in-chief stated that Ralla Singh forcibly took possession of disputed land though at that time case was pending in the Hon'ble High Court. This contention can simply be not washed away. He further stated that date of birth of Lakhbir Singh, plaintiff is 30.5.69 and that of Gurmukh Singh 30.5.67. Copies of their school certificates being Ex.P1 and Ex.P.2 Ralla Singh and defendants taking advantage of minority of plaintiff Gurmukh Singh and Lakhbir Singh and Gurdev Kaur being widow, taking forcible possession, the courts are not to put seal of approval on such illegal acts of Ralla Singh and defendants. When Hon'ble High Court in

regular second appeal had observed that Ralla Singh was not owner in possession of suit land, the trial Court fell in gross error in relying upon any alleged admission of attorney of Gurdev Kaur etc. so as to come to conclusion that Ralla Singh were in possession of suit land since year 1970. The revenue record proved in evidence on behalf of plaintiffs show that till the year 1971-72 Dalbara Singh has shown to be owner in possession of suit land. Justice N.K. Kapoor has observed that application filed u/s 144 CPC was misconceived and he has no where observed that plaintiffs were not entitled to possession of suit land. As regards the arguments that plaintiffs should have filed the suit immediately when Ralla Singh had taken possession from them is fallacious. When matter had been pending before Hon'ble High Court in Regular Second Appeal between the parties, there was no necessity of plaintiffs filing a separate suit at that time. There is no question of defendants having become owners by way of adverse possession in terms of section 27 of Limitation Act and title of plaintiffs coming to an end. I wonder when Hon'ble High Court in judgment delivered on 27.2.1987 observed that Ralla Singh was not owner in possession of suit land, how the trial Court is coming to contrary conclusion stating that title of plaintiffs in the suit land stood extinguished and limitation once started cannot be stopped. As a matter of fact cause of action to recover possession had arisen to plaintiffs when the regular second

appeal had been decided by Hon'ble High Court on 27.2.1987. The suit filed is within 12 years thereof and cannot be held to be time barred. The plaintiffs are running from pillar to post to seek possession of land belonging to them and defendants are retaining possession of land to which they have no right. Counsel for appellants had referred to various authorities i.e., KARUNAKARAN NAIR Vs. MEHTA (P) LTD.' 1998 (3) CCC page 167 wherein Hon'ble High Court of Kerala had observed that it is not necessary to get the benefit of S.144 that the possession should have been lost through a process of execution. If a person dispossessed under the colour of the decree and that decree is subsequently reversed, then he is entitled to restitution. He further referred to "MRS. KAVITA TREHAN AND ANOTHER VS. BALSALA HYGIENCE PRODUCTS LTD., AIR 1995 Supreme Court page 441, wherein it was observed that the law of restitution encompasses all claims founded upon the principle of unjust and enrichment. Restitutionary claims are to be found in equity as well as at law and that section 144 CPC incorporates only a part of the general law of restitution and is not exhaustive and further in case not falling within ambit of section 144 restitution can be made under inherent powers. He further referred to "GURDIT SINGH (DEAD) THROUGH L.Rs. Vs. NIRMAL SINGH," 2001 (1) S.L.J. 362 by Hon'ble Supreme Court of India, "THE ASSISTANT EXECUTIVE ENGINEER VS.

B.K.NAGARAJU", 1998 (1) CCC 217 by Hon'ble High Court of Karnataka in that regard. Counsel for appellants had argued that the appellants are entitled to get the period for which they had been prosecuting application u/s 144 CPC excluded from the period of limitation. To press home this point, he referred to "GHASI RAM AND ORS. Vs. CHAIT RAM SAINI & ORS.' 1998 (2) Apex Court Journal 361(S.C.) wherein it had been observed that to get benefit of S. 14, the party seeking its benefit must fulfill the four conditions- (1) The plaintiff who filed the suit had been prosecuting another civil proceedings with due diligence; (2) The earlier proceeding resorted by the plaintiff was based on the same cause of action (3) The former proceeding was prosecuted by the plaintiff in good faith in a Court;(4) The court, due to the defect of jurisdiction or other cause of a like nature, was unable to entertain such proceeding. In support of his contention that defendants have failed to show as to which date their possession had become adverse the suit is not time barred Sh. Singal relied upon "Parwatabai Vs. Sonabai & Ors.", 1997 (1) S.L.J. 276, wherein Hon'ble Supreme Court of India had observed that suit for possession has to be filed within 12 years and it is for appellant to prove as to on which date his prosecution became adverse to respondent title. Sh. Singal further placed reliance upon "UJAGAR SINGH Vs. SHIVRAJ SINGH", 1997 (1) CCC PAGE 313, wherein Mr. Justice R.L. Anand of Hon'ble High Court of Punjab and

Haryana had observed that plea of adverse possession is destructive as the defendants themselves claimed to be the owners of property by virtue of conveyance deeds. He further referred to “NAHAN FOUNDRY LIMITED, NAHAN DISTRICT SIRMUR VS. JOGINDER SINGH AND OTHERS.” 1996 (1) S.KL.J. PAGE 325, WHEREIN MR. Justice N.K. Kapoor of Hon'ble High Court of Punjab and Haryana had observed that a person claiming possession on the basis of title can institute a suit for possession within a period of twelve years when the possession of such a person become adverse to that of plaintiff. The onus is upon a person, who sets up the hostile title. He further referred to “GURCHARAN SINGH VS. GRAM PANCHAYAT, GAJRAL “ 2001 (1) S.L.J. 587 wherein justice Swatanter Kumar of Hon'ble High Court of Punjab and Haryana had observed that the pre-requisite of claiming adverse possession is admitted ownership of another person. He furthe placed reliance upon “Babu Khan & Ors. Vs. Nazim Khan (dead) by L.Rs. And others,: 2001 SAR (CIVIL) 430 BY THE Apex Court in support of his argument that suit of appellant is within limitation . He further referred to “”MARWARI KUMAR & ORS. Vs. BHAGWANPURI GURU GANESHPURI & ANR.”, 2000(2) Apex Court, 66 (S.C.) wherein it was observed that when there is no proof as to date time and manner in which possession as Pujari got converted into open, hostile and adverse, the claim for adverse possession

is untenable. As regards the plea that suit is not barred under Order 2 Rule 2 CPC Sh. Singh relied upon “ASHOKA BUILDERS AND PROMOTORS VS. EDWARD KEVENTER (SUCCESSORS) P. LTD.”, 1994 (1) CCC page 351 and “S.H.TARALAGATTI VS. UNION OF INDIA & OTHERS', 1982 (2) CCC page 260, by Hon'ble High Court of Karnatka. On the other hand, counsel for respondent referred to “RAJINDER SINGH AND OTHERS VS. SANTA SINGH AND OTHERS” AIR 1973 Supreme Court page 2537, wherein it has been observed by Apex Court that when there had been adverse possession of defendants for over 12 years, the pendency of earlier suit by defendants, which was finally dismissed by High Court would not arrest the running of period of limitation during pendency of that suit. This authority if not applicable due to different facts. Here the defendants have failed to show that they or their predecessor Ralla Singh had been in open, notorious hostile continues possession of suit land to the knowledge of plaintiffs and their possession has matured into ownership. They are not clear regarding the date when their adverse possession started. The allegation in that regard are very vague and of general type which do not make any sense. Similarly, the second authority referred to by Sh. Garg “THIMALAH VS. MADEGOWDA”, AIR 1989 KARNATAKA page 83 is not applicable. Regarding the next authority “P.K. KUTTY ANUJA RAJA VS. STATE OF

KERALA" 1996 (1) Apex Court Journal 346 (S.C.) by Hon'ble Supreme Court of India wherein it had been observed that once the limitation starts running it runs its full course until the running of the limitation is intradicted by an order of the Court. There is no dispute with the proposition of law laid down in this authority but here the suit filed by plaintiffs has been found to be within period of limitation. As regards the next authority "RAO NARAIN SINGH Vs. DURGA DEVI;, 1998 (1) CCC PAGE 645 BY Mr. Justice V.K. Jhanji of Hon'ble High Court of Punjab and Haryana Under Order 2 Rule 2 CPC when plaintiff had filed a suit for injunction when a right to suit for specific performance had accrued but that relief had not been claimed and suit was found to be hit by Order 2 Rule 2 CPC. Here the facts are entirely different. The suit of plaintiff is definitely not hit by order 2 Rule 2 CPC as rightly held by trial Court. The suit filed before Shri S.K. Garg was for grant of permanent injunction claiming possession by the present plaintiffs. It had been dismissed by Sh. S.K. Garg relying upon judgment of Sh. Amarbir Singh, then Additional District Judge, Ludhiana holding Ralla Singh to be owner in possession which judgment was set aside by Hon'ble High Court and Ralla Singh was not found to be owner in possession. Therefore, there was no question of present plaintiffs committing to sue for possession. If Ralla Singh took forcible possession during pendency of regular second appeal, it does not go to show that

he had been in possession at the time of filing of suit before Sh. S.K.Garg and that the present plaintiff should have ask for possession in that suit. Therefore, that authority is not applicable. Similarly, the other authority "BHAG RAM & ORS. VS. PAL SINGH & ORS.", 1996 (1) CCC page 50 (P&H), "RAKHA SINGH VS. AMRIT LAL AND OTHERS," AIR 1984 Punjab and Haryana 47 do not help the case of defendants. As regards the next authority "SALOCHANA AMMA VS. NARAYANAN NAIR," AIR 1994 Supreme Court, 152, that dealt with doctrine of res-judicata. Here there is no plea by defendants that suit of plaintiffs is barred by res judicata. Therefore, this authority does not help the defendants. Regarding next citation "A.RUKUMANI VS. V.GOPALASWAMY", 1994 (2) RRR page 70 that had all together different facts. Here the present defendant have been unable to show that they have become owners of suit land by way of adverse possession. For similar reasons, the citation "PARSINNI (DEAD) BY L.Rs VS. SUKHI", 1999 (3) RRR page 681 by Apex Court is not helpful to case of defendants. As a result of discussion above, I find that finding of trial court on issues No.1,2,3,4,5, and 6, 7 are wrong. Such findings are reversed and all the issues are decided in favour of plaintiffs against defendants holding that sale deed No. 6156 and 6157 are liable to be set aside and mutation No. 5958 dated 19.12.77 is also liable to be set aside. The suit for possession filed by

plaintiffs against defendants is maintainable and plaintiffs are entitled to possession of the suit land. Similarly, the suit of plaintiff is within time and is not time barred and defendants have not become owners of suit land by way of adverse possession. Therefore, the plaintiffs are not estopped by their act and conduct from filing the present suit and suit is properly valued for purposes of court fee and jurisdiction besides suit is within limitation, the suit is hit by Order 2 Rule 2 C.P.C. The judgment and decree of trial Court are liable to be set aside not based upon proper appreciation and appraisal of evidence and correct interpretation of law. The appeal is allowed with the result suit for possession of 36K-4M of suit land filed by plaintiffs is decreed in favour of plaintiffs against defendants ignoring the impugned sale deeds and mutation holding those to be null and void. The suit is decreed with cost in favour of the plaintiffs. The defendants are to bear the cost of appeal, the cross objections of respondents are dismissed. Decree sheet be prepared. Appeal file be consigned to record room. Lower court be returned."

Mr. Amit Rawal, Advocate learned counsel appearing on behalf of the appellant submitted that the following substantial questions of law arise for consideration in this appeal :-

1. Whether the appellant defendants had perfected their title by way of adverse possession ?
2. Whether the judgment passed by the learned appellate

Court rejecting the claim of the appellants of adverse possession is perverse and is outcome of misreading of oral and documentary evidence brought on record ?

Mr. Amit Rawal, Advocate learned counsel appearing on behalf of the appellants contended that the judgment and decree passed by the learned lower appellate Court on the face of it is perverse as the court has expressed the opinion on the judgment and decree passed in favour of the predecessor in interest of the appellants which cannot be sustained. However, this plea of the learned counsel for the appellant cannot be accepted as the observations made by the learned lower appellate Court are not relevant for adjudication of the dispute between the parties.

The learned counsel for the appellant contended that regular second appeal was decided in favour of the predecessor in interest of the plaintiff respondents in the year 1987 but instead of filing a suit for possession they chose to move an application under Section 144 of the Code of Civil Procedure which was dismissed by the Hon'ble High Court by observing that since the case set up by the party was that the respondents have forcibly occupied the suit land then the application under Section 144 of the CPC was wholly misconceived. The contention of the learned counsel for the appellants, therefore, was that the possession of the defendant appellants was admittedly adverse and hostile and, therefore, the suit filed by the plaintiff respondents was liable to be dismissed as the defendant appellants had perfected their title.

The learned counsel for the appellants in support of this contention has placed reliance on the judgment of the Hon'ble Supreme

Court in the case of ***Rajender Singh and others Vs. Santa Singh and others AIR 1973 Supreme Court 2537*** wherein the Hon'ble Supreme Court has been pleased to lay down that lis pendens contained in Section 52 of the Transfer of Property Act would not arrest the running of period of limitation during the pendency of suit. The order passed by the Hon'ble Supreme Court reads as under :-

> "(A) Limitation Act (1908) Ss. 3, 28, Arts. 142, 144 – Adverse possession of defendants for over 12 years – Pendency of earlier suit by defendants which was finally dismissed by High Court – Doctrine of lis pendens, contained in S. 52 of T.P. Act, would not arrest the running of period of limitation during the pendency of that suit."

The learned counsel for the appellants contended that once it was admitted case of the plaintiffs that the defendants had taken illegal forcible possession then their possession was treated to be hostile and the suit filed, therefore, beyond a period of 12 years was not competent.

The learned counsel for the appellants thereafter contended that the suit filed by the plaintiffs was barred on the principle of res judicata as in the earlier suit the plaintiffs had a remedy to seek possession of the property and having not sought the same the second suit was not competent. In support of this contention he has placed reliance on the judgment of this Court in the case of ***Bhag Ram & Ors. Vs. Pala Singh & Ors. 1996(1) Civil Court Cases 50 (P&H)*** where in this Court has been pleased to lay down that a party is required to include the whole of the claim which he is entitled to lay in respect of a cause of action and in case he relinquishes any portion

of the claim he cannot make the grievance of the same lateron.

The learned counsel for the appellants also referred to the judgment of the Hon'ble Supreme Court in the case of ***Sulochana Amma Vs. Narayanan Nair AIR 1994 Supreme Court 152*** to contend that in a suit for injunction if title is in issue the decree by the Court operate as res judicata in a later suit based on title between the same parties. The reliance was also placed on the judgment of this Court in the case of ***Rakha Singh Vs. Amrit Lal and others AIR 1984 (P&H) 47***.

The learned counsel for the appellants in addition of the judgment of the Hon'ble Supreme Court in the case of ***Rajender Singh and others Vs. Santa Singh and others*** (Supra) placed reliance on the judgments of this Court in the cases of ***Parsinni (Dead) by L.Rs. Vs. Sukhi 1993(3) RRR 681;*** judgments of the Hon'ble Supreme Court in the cases ***Karnataka Board of Wakf Vs. Government of India & Ors. 2004(3) Civil Court Cases 326 (S.C.)*** and ***Bondar Singh and others Vs. Nihal Singh and others (2003) 4 Supreme Court Cases 161*** in support of his contention that the possession of the appellants was proved to be adverse.

Mr. G.S. Punia, learned counsel for the respondents, on the other hand, contested the claim raised by the appellants primarily on the ground that the adverse possession was claimed by the appellants for the first time in the written statement filed in the present suit, whereas earlier they were claiming to be owner of the property under a sale deed alleged to have been executed by Ralla Singh. The contention of the learned counsel for the respondents, therefore, was that this plea is not available in view of the law laid down by this Court in the case of ***Ujagar Singh Vs. Shivraj***

Singh 1997(1) Civil Court Cases 313 (P&H) wherein this Court has been pleased to lay down as under :-

> "Adverse possession – Possession of defendant for more than 12 years and their possession hostile to plaintiff – Defendant raised construction to the knowledge of plaintiff – Held, plea of adverse possession is destructive as the defendants themselves claimed to be the owners of property by virtue of conveyance deeds."

The learned counsel for the respondents also placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Sajjadanashin Sayed Md. B.E. Edr.(D) by L.Rs. Vs. Musa Dadabhai Ummer and others AIR 2000 Supreme Court 1238*** to contend that suit for injunction filed on earlier occasion would not operate as res judicata in a suit filed for possession on the basis of title. The judgment of the Hon'ble Supreme Court reads as under :-

> "The words used in S. 11, CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an

auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue."

The learned counsel for the respondents also contended that in order to succeed on the plea of adverse possession it was required on the part of the appellants to state with sufficient clarity as to when adverse possession commenced and nature of its possession. In support of this contention he has placed reliance on the judgment of this Court in ***Gulwant Singh (Died) through LRs Vs. Ajit Singh (Died) through LRs. 2005(1) P.L.R. 106***, wherein this Court has been pleased to hold as under :-

> "16. The learned First Appellate Court has partly dismissed the suit on the basis of presumption that the defendants have perfected their title by adverse possession. There is no equity of a person pleading adverse possession since he is trying to defeat the right of a true owner."

On consideration of the matter, I find no merit in this appeal. The plea of res judicata is a plea of mixed question of law and facts. No such plea was raised before the Courts below or issue framed thereon. Therefore, the learned counsel for the appellant was not justified in raising the plea that the suit was barred by the principle of res judicata.

The plaintiffs were declared to be owners in the year 1987 and it was thereafter that the cause of action had accrued to the plaintiffs to seek possession of the property which was in possession of the defendant appellants and, therefore, it could not be said that the judgment passed prior

to passing of the decree in the regular second appeal could be a res judicata or the suit be barred under Order 2 Rule 2 C.P.C. as was sought to be contended. It may further be mentioned here that in the previous suit filed for injunction, the cause of action was totally different.

The plea of the appellants that they had perfected their title by way of adverse possession cannot be sustained in view of the judgment of the Hon'ble Supreme Court in the case of ***T. Anjanappa and others Vs. Somalingappa and another (2006) 7 Supreme Court Cases 570*** wherein the Hon'ble Supreme Court has been pleased to lay down as under :-

> "12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in a denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.
>
> 14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the

rightful owner and tends to extinguish that person's title. Possession is not held to be adverse, if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. Trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession:

“14. .....Adverse possession means a [hostile possession] which is expressly or impliedly in a denial of title of the true owner. Under Article 65 [of the Limitation Act,] burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.....

15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's

title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.(See Annasaheb Bapusaheb Patil V. Balwant, SCC p. 554, paras 14-15.)

18. It is the basic principle of law of adverse possession that (a) it is the temporary and abnormal separation of the property from the title of it when a man holds property innocently against all the world but wrongfully against the true owner; (b) it is possession inconsistent with the title of the true owner."

In the present case it would be seen that the vendor of the defendant appellant was claiming to be owner of the property. Similarly the appellants claimed their title on the basis of sale deed executed in their favour by Ralla Singh. Thus, the plea of adverse possession was not raised as observed by the Hon'ble Supreme Court which could entitle them to claim that their title was perfected by way of adverse possession.

In view of this, there is hardly any ground to interfere with the judgment and decree passed by the learned lower appellate Court. Consequently, the questions of law as framed, are answered against the appellant.

Consequently, the appeal is dismissed with no order as to costs.

21.11.2007 **(VINOD K. SHARMA)**

'sp' **JUDGE**